

Digitally signed  
by Kathryn  
Ross  
Date:  
2017.09.17  
15:37:57 -04'00'

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of )  
 )  
The Honorable Josh Hawley, )  
Attorney General of Missouri; ) MUR 7267  
Hawley for Missouri; and )  
Doug Russell, )  
in his official capacity as Treasurer )

RESPONSE

Through counsel, Josh Hawley, Attorney General of Missouri, Hawley for Missouri, and Doug Russell, in his official capacity as Treasurer (collectively, "Respondents"), provide the following response to the complaint filed American Democracy Legal Fund ("Complainant") and designated by the Commission as MUR 7267.

With misstated facts and a confused understanding of the law, Complainant wrongly asserts that Respondents are in violation of the Federal Election Campaign Act of 1971, as amended ("FECA"), and Commission regulations. Once Attorney General Josh Hawley ("Hawley") decided to test-the waters, much less campaign for the U.S. Senate, he filed a Statement of Candidacy with the Commission well within the 15-day time period prescribed by 52 U.S.C. § 30102(e) and 11 C.F.R. § 101.1(a). Before that decision was made—and since that time—all funds used by Hawley to either explore the viability of or to promote his candidacy have been expended by his federally registered committee. In other words, no funds have been spent by his state campaign committee, Hawley for Missouri, for the purpose of exploring the viability of or promoting a federal candidacy. As explained below, the Commission should find it easy to determine that there is no reason to believe Respondents violated any provision of FECA or Commission regulations.

I. BACKGROUND

After being sworn in as Attorney General of Missouri in January 2017, Hawley immediately began focusing on the issues facing the people of Missouri and aggressively enacting the agenda he ran on. While he certainly engaged in political activities keeping an eye on his reelection prospects for 2020, a potential candidacy for the U.S. Senate would not be something he would consider for months to come.

T | 202.417.3529

🐦 | @GoberGroup

F | 877.437.5755

🌐 | GoberGroup.com

Part of his strategy—for both carrying out his agenda as Attorney General and improving his chances for reelection—was to expand his media outreach and build clout for the Office of Attorney General. To that end, and with over one-million dollars in cash-on-hand left in his state committee coffers, Hawley began a media campaign to bring attention to several issues important to Missourians, including human trafficking. In compliance with state law, Hawley used approximately \$170,000 of his state committee's funds to engage in media outreach, coalition building, and expanding his base of support to bring attention to new human trafficking initiatives and other important issues. In addition, his state committee launched digital advertisements that highlighted these issues. Once again, all of this was done with an eye to enact the agenda Hawley campaigned on and to ensure his reelection in 2020.

It was not until July 2017 that the prospect of a 2017-18 federal candidacy was seriously considered by Hawley. After several other potential Republican candidates chose not to run for U.S. Senate, and after several inquiries to Hawley regarding his interest in that office, he began contemplating a candidacy in earnest. To that end, Hawley traveled to Washington, D.C. on July 25-26, 2017, to speak to others about the viability of a potential candidacy. This trip, paid for by his federal committee, Josh Hawley Senate Exploratory Committee, launched a new wave of speculation about Hawley's potential candidacy.

While some tweets and anonymously sourced media reports claimed Hawley had decided to become a candidate, none of those were true and none were done with the foreknowledge of Hawley. In fact, it is Hawley's best recollection that it was not until approximately one week after the trip that Hawley finally decided to become a candidate for the U.S. Senate, but that decision was certainly made on or after July 19, 2017.<sup>1</sup> Of course, because Hawley subsequently filed both a Statement of Candidacy and a Statement of Organization with the Commission on August 2, 2017, the relevant "candidacy date" for determining whether Hawley timely filed as a candidate is July 19, 2017.<sup>2</sup>

## II. LEGAL ANALYSIS

### A. Respondent Timely Filed a Declaration of Candidacy.

The Complainant alleges that Hawley failed to timely file as a candidate for U.S. Senate. To support that claim, Complainant proffers that somehow employing a consultant to a state campaign committee, producing an issue advertisement without a single reference to federal office, and statements—some of which were anonymous—made by individuals other than Hawley clearly indicate that Hawley had decided to become a federal candidate. This stretches the law beyond any cognizable recognition, and each of these factors proffered misses important and obvious legal distinctions.

<sup>1</sup> Affidavit of Joshua Hawley, Para. 2.

<sup>2</sup> For this reason, the phrases "on or after July 19, 2017" and "July 19, 2017, or later" are used to reference this relevant date throughout this Response and in Mr. Hawley's Affidavit.

As the Commission well knows, an individual is a "candidate" if he or she receives contributions or makes expenditures in excess of \$5,000 or consents to another person's receiving contributions or making expenditures in excess of \$5,000 on the individual's behalf.<sup>3</sup> Although an individual may raise or spend more than \$5,000 on testing-the-waters activities without becoming a candidate, the testing-the-waters exemption does not apply "to individuals who have decided to become candidates."<sup>4</sup> Accordingly, if an individual has raised or spent more than \$5,000 on testing-the-waters activities, the individual becomes a candidate when he or she makes a *private determination* to run for federal office.<sup>5</sup> Within 15 days of reaching that \$5,000 threshold and deciding to become a candidate, the individual must file a Statement of Candidacy (FEC Form 2).<sup>6</sup> Within 10 days of that filing, the individual's principal campaign committee must submit a Statement of Organization (FEC Form 1).<sup>7</sup>

The Complainant mentions other legal authority for its allegations, both of which are misplaced. First, in Advisory Opinion 1981-32 (Askew), the Commission determined that, *inter alia*, a list of activities undertaken by the Requestor would fall outside the testing-the-waters paradigm and the Requestor would have been a candidate when those "activities t[ook] place in a factual context indicating that [Requestor had] moved beyond the deliberative process of deciding to become a candidate, and into the process of planning and scheduling public activities designed to heighten his political appeal to the electorate."<sup>8</sup> Second, in MUR 5934 (Thompson), the Commission determined that the Respondent had not become a candidate even though the individual had made statements suggesting he had decided to become a candidate and had signed a long-term lease for his eventual campaign headquarters.<sup>9</sup> As explained above, both of the cited authorities actually demonstrate how Respondents in the instant matter were *compliant* under the standards articulated by the Commission.

Attorney General Josh Hawley did not decide to become a federal candidate more than 15 days prior to filing his Statement of Candidacy on August 2, 2017.<sup>10</sup> Thus, he filed with the Commission in a timely manner, and none of the activities listed by Complainant

<sup>3</sup> 52 U.S.C. § 30101(2)(A); 11 C.F.R. § 100.3(a).

<sup>4</sup> 11 C.F.R. §§ 100.72(b), 100.131(b). *See also* Advisory Opinion 1981-32 (Askew) at 4 (explaining that regulation distinguishes "activities directed to an evaluation of the feasibility of one's candidacy . . . from conduct signifying that a private decision to become a candidate has been made").

<sup>5</sup> Advisory Opinion 2015-09 (Senate Majority PAC and House Majority PAC) (emphasis added).

<sup>6</sup> 52 U.S.C. § 30102(e); 11 C.F.R. § 101.1(a).

<sup>7</sup> 52 U.S.C. § 30103(a); 11 C.F.R. § 102.1(a).

<sup>8</sup> Advisory Opinion 1981-32 (Askew) at 5.

<sup>9</sup> MUR 5934 (Thompson), Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter, McGahn, and Weintraub.

<sup>10</sup> Affidavit of Joshua Hawley, Para. 2.

can be read to suggest otherwise because. In fact, other than his travel to Washington, D.C. on July 25-26, 2017, none were even testing-the-waters activities under federal law.

The consultants hired by Hawley for Missouri—who were paid by Hawley’s state committee during his initial 2016 campaign for Attorney General—were paid to continue assisting Hawley with his political strategy as Attorney General and as a likely candidate for reelection in 2020. This has, in fact, become the norm for most federal and other statewide officeholders across the country. But political norms aside, the critical fact is that the approximately \$30,000 paid to the consultants by the state committee had no relation to his now-federal candidacy. In addition, in Advisory Opinion 1981-32 (Askew), the Commission indicated that the hiring of consultants was indicative of an individual having decided to become a candidate *only* when the consultant began “the process of planning and scheduling public activities.” This is inapplicable to Hawley because he did not plan or schedule any public activities as even a potential federal candidate until July 19, 2017, or later. The same is true of the advertisement that focused entirely on the Attorney General Office’s human trafficking initiatives. Not only did the advertisement contain no reference to federal office or any potential federal candidacy, it was aired well before Hawley was contemplating a federal candidacy. Therefore, it cannot be viewed as an indicator that Hawley had decided to become a candidate, especially considering he had only entered “the deliberative process of deciding to become a candidate” well after these expenses were made.<sup>11</sup> These were all normal activities by a state official engaging in official conduct and preparing for reelection to state office.

As to statements made by journalists and/or individuals other than Hawley about a potential Hawley candidacy, Hawley began to seriously consider seeking nomination and election to the federal office of United States Senator from Missouri during the 2017-2018 election cycle no earlier than July 3, 2017, and he ultimately made the decision to run for such office at some point on or after July 19, 2017.<sup>12</sup> As the Commission is well aware, it has never determined that candidacy was triggered on the basis of statements solely made by others.<sup>13</sup> Indeed, Complainant acknowledges as much.<sup>14</sup>

In Complainant’s world, all activity, political and official, undertaken by a state officeholder and a state candidate magically and retroactively becomes activity indicative of federal candidacy the moment that individual is rumored—to no fault of their own—to be a potential federal candidate. That would obviously stretch FECA beyond its practical and constitutional bounds. And although the concept of indicia of candidacy can be

<sup>11</sup> Advisory Opinion 1981-32 (Askew) at 5.

<sup>12</sup> Affidavit of Joshua Hawley, Para. 2.

<sup>13</sup> MUR 5934 (Thompson), Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter, McGahn, and Weintraub.

<sup>14</sup> See MUR 7267 (Hawley), Complaint at 8; citing MUR 5934 (Thompson), First General Counsel’s Report (suggesting that statements were indicative of candidacy only “when taken with other statements *made by the individual*”) (emphasis added).

esoteric, what is plain here is that Hawley had not decided to be a federal candidate more than 15 days prior to filing his Statement of Candidacy.<sup>15</sup> All of the activities listed by Complainant simply have no legal basis to suggest otherwise. The Commission has seen examples of candidates improperly declaring their candidacy late, but the facts here suggest nothing short of full compliance; and the Commission has dismissed matters where the facts were clearly closer to problematic than those seen here.<sup>16</sup> Therefore, there is no reason to believe Hawley failed to timely file a declaration of candidacy.

**B. All of Respondent's Testing-the-Waters Activities Have Been Paid with Federal Funds, While Other Activities Served No Federal Campaign Purpose.**

The Complainant alleges that Respondents violated FECA by using nonfederal funds for testing-the-waters activities,<sup>17</sup> but Complainant wrongly asserts that several activities undertaken by Hawley prior to his filing of a Statement of Candidacy were testing-the-waters activities. The assertions are made in error because only one activity described by Complainant was for testing-the-waters, and that activity was paid for with federal funds. The other activities cited by Complainant had no relation to Hawley's potential federal candidacy and were undertaken neither to promote it nor to test its viability.

Commission regulations provide that testing-the-waters activities include, but are not limited to, polling, making telephone calls, and travel.<sup>18</sup> Further, examples of activities that indicate that an individual has decided to become a candidate—and thus, are excluded from testing-the-waters activities—include, but are not limited to, advertising to publicize an intention to campaign for federal office, raising excess funds or undertaking activities to amass funds for a potential candidacy, and making or authorizing statements that reference the individual as a candidate.<sup>19</sup> The regulations also state that only federally permissible funds may be used for testing-the-waters activities.<sup>20</sup>

Complainant cites a series of advisory opinions where the Commission determined that the Requestors' activities were testing-the-waters activities and not indicative of candidacy; a determination each was seeking.<sup>21</sup> This is obviously distinguishable from determining whether activities by a state candidate and officeholder is actually federal testing-the-waters activities and not legitimate state activity. Thus, those advisory opinions

<sup>15</sup> Affidavit of Joshua Hawley, Para. 2.

<sup>16</sup> See e.g., MUR 5934 (Thompson), Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter, McGahn, and Weintraub.

<sup>17</sup> Respondents concede that federal testing-the-waters activities, if they are in fact conducted, must be paid for with federally permissible funds.

<sup>18</sup> 11 C.F.R. § 100.72(a).

<sup>19</sup> 11 C.F.R. § 100.72(b).

<sup>20</sup> 11 C.F.R. § 100.72(a).

<sup>21</sup> MUR 7267 (Hawley), Complaint at 5.

have no bearing on the circumstances described herein; and even if they did, it would be an egregious use of an advisory opinion as a "sword" in an enforcement matter.<sup>22</sup> Complainant also relies on MUR 5722 (Friends of Lauzen) for the principle that federal testing-the-waters activities may not be paid for with money from a state campaign account.<sup>23</sup> That principle is not being disputed here, but it does beg the question: What activity is testing-the-waters activity? In MUR 5722, it was clear that the poll at issue was a testing-the-waters activity because it was used by the state senator to gauge viability for a federal candidacy. The facts here are substantially different.

First, Hawley's trip to Washington, D.C. in July 2017 was testing-the-waters activity. That is readily admitted, and the costs of the trip have been paid for with federal funds from his federally registered committee. In fact, that payment was made in August 2017 and will be reflected in the federal committee's next regularly scheduled report to the Commission. Everything associated with that trip was handled in compliance with FECA and Commission regulations.

Next, the purpose of the Hawley for Missouri digital advertisement was to raise awareness regarding the Attorney General Office's new human trafficking initiatives, not to test the waters for a potential federal candidacy.<sup>24</sup> It was filmed and aired well before Hawley began contemplating a U.S. Senate candidacy during the 2017-18 election cycle and was done in compliance with Missouri law.<sup>25</sup> That law allows for Missouri officeholders to use state campaign funds for expenses related to duties as an officeholder, and bringing awareness to and enforcing laws against human trafficking is obviously within the Missouri Attorney General's purview. Furthermore, that advertisement contains no material spoken or otherwise indicative of a federal candidacy. FECA certainly does not prohibit a state officeholder from appearing in a digital advertisement if that officeholder may one day in the future be a federal candidate.

Finally, Complainant takes much issue with Hawley's employ of consultants in early 2017. As stated above, the simple fact is those consultants aided Hawley during his initial 2016 campaign for Attorney General, and they were continued to be paid to support his political considerations as Attorney General and preparing for his reelection in 2020.<sup>26</sup> Complainant cites no specific activity undertaken by the consultants that are indicative that

---

<sup>22</sup> See e.g., Amy Rothstein, Advisory Opinion Process, in CORPORATE POLITICAL ACTIVITIES 2007: COMPLYING WITH CAMPAIGN FINANCE, LOBBYING & ETHICS LAWS 15 at 6-7 (Vigo G. Nielsen et al., 2007) at 6-7 ("The right to rely on an advisory opinion is a "shield" from a Commission enforcement action to the extent that specific activity is determined to be lawful in the advisory opinion. It is not a "sword" mandating Commission enforcement action where the activity of a person who is the target of a complaint is allegedly indistinguishable from activity determined not to be lawful in an advisory opinion issued to someone else.").

<sup>23</sup> MUR 7267 (Hawley), Complaint at 6.

<sup>24</sup> Affidavit of Joshua Hawley, Para. 3.

<sup>25</sup> RSMo 130.034.

<sup>26</sup> Affidavit of Joshua Hawley, Para. 3.

Hawley was contemplating a federal candidacy prior to July 2017. In Complainant's view, the fact that Hawley was politically active in Missouri while outsiders speculated about the viability of a hypothetical federal candidacy is itself a violation. That is not the law. To be clear, all those activities listed on the Hawley for Missouri state campaign finance reports were for state political activity.<sup>27</sup> Once again, FECA does not prohibit a state officeholder and candidate from using state committee funds to pay for state political activity if that officeholder and state candidate may one day in the future be a federal candidate.

While FECA prohibits the use of nonfederal funds for testing-the-waters activities, it does not ban the use of nonfederal funds for state campaign activity by an individual. And, state campaign activity cannot be magically transformed into federal "testing-the-waters activity" simply because a state officeholder tests the waters at a *later* date. There must, for both practical and constitutional reasons, be a demarcation. There was clearly one here. Hawley engaged in state campaign activities in early 2017, but when he began to test the waters for a federal candidacy in July 2017, he established a federal committee and used federal funds from that committee to pay for the activity. This will all be clearly shown on the federal committee's October 2017 report to be filed the Commission. This being the case, there is no reason to believe Hawley violated FECA or Commission regulations by using nonfederal funds on testing-the-waters activities.

### III. CONCLUSION

As described above, Respondents have been fully compliant with FECA and Commission regulations. Thus, the Commission should find no reason to believe that a violation has occurred in relation to the facts presented.

Sincerely,



Chris K. Gober  
Troy McCurry

Counsel to Josh Hawley, Attorney General of Missouri, Hawley for Missouri, and Doug Russell, in his official capacity as Treasurer

---

<sup>27</sup> *Id.*

**AFFIDAVIT OF JOSHUA HAWLEY**STATE OF Missouri§  
§  
§COUNTY OF Boone

BEFORE ME, the undersigned authority, on this day personally appeared JOSHUA HAWLEY, who swore or affirmed to tell truth, and stated as follows:

1. My name is Joshua David Hawley. I am a licensed attorney and currently serving as the 42nd Attorney General of the State of Missouri. I am over the age of eighteen years, have never been convicted of a felony, and I am in all ways competent to give this declaration. I have personal knowledge of the matters set forth herein and give this declaration upon that basis. If called as a witness before a Court or other tribunal, then I could and would competently testify as is set forth herein.

2. Regardless of any contrary statements made by journalists and/or individuals other than myself, I began to seriously consider seeking nomination and election to the federal office of United States Senator from Missouri during the 2017-2018 election cycle no earlier than July 3, 2017, and I ultimately made the decision to run for such office at some point on or after July 19, 2017.

3. No funds referenced in the Complaint spent from accounts associated with Hawley for Missouri, my state campaign committee, were for the purpose of either (i) exploring the viability of a federal candidacy or (ii) promoting a federal candidacy.

END OF AFFIANT'S STATEMENT.

  
Joshua Hawley

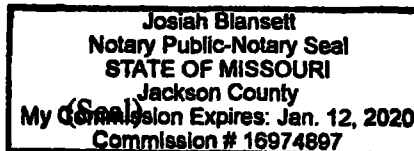
STATE OF MO§  
§  
§COUNTY OF Boone

Subscribed and sworn to (or affirmed) before me on this 15 day of September, 2017.

by Missouri Drivers License,

proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

Signature 



A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.